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2 Speakerphone Conference

3
4 UNITED STATES DISTRICT COURT
5 SOUTHERN DISTRICT OF NEW YORK

6 FRANK GILLIARD,

7 Plaintiff, New York, N.Y.
8 v. 14 Civ. 4729 (JPO)

9 THE CITY OF NEW YORK, et al.,

10 Defendants.

11
12 April 21, 2016
13 9:58 a.m.

14 Before:

15 HON. DEBRA C. FREEMAN,
16 Magistrate Judge

17 APPEARANCES (Via speakerphone)

18 FRANK GILLIARD

19 Plaintiff Pro Se

20 NEW YORK CITY LAW DEPARTMENT

21 Attorneys for Defendants

22 BY: DANIEL G. SAAVEDRA
23 Assistant Corporation Counsel

24

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1 (In chambers; call connected)

2 THE COURT: Good morning. This is Judge Freeman.

3 MR. SAAVEDRA: Good morning your Honor.

4 MR. GILLIARD: Good morning.

5 THE COURT: Good morning. I have plaintiff on the
6 phone, Mr. Gilliard?

7 MR. GILLIARD: Yes.

8 THE COURT: OK. On defendants' side, who do I have?

9 MR. SAAVEDRA: Daniel Saavedra, your Honor, for the
10 defendants.11 THE COURT: OK, Mr. Saavedra. I had received a letter
12 from Mr. Gilliard saying that he had not been able to obtain
13 that trial transcript or the relevant portions of the trial
14 transcript that he was looking for. Mr. Saavedra, did you see
15 that letter? It was docket 84.16 MR. SAAVEDRA: I did, and I am reading it now, your
17 Honor.18 THE COURT: So I did say in my prior order, which was
19 from the end of February, Docket 76, I did say that if
20 Mr. Gilliard ran into difficulties obtaining those trial
21 minutes after making an effort, he should say so and I would
22 consider whether I should direct the city to try to obtain them
23 for him in discovery.

24 MR. SAAVEDRA: Yes, your Honor. If I may?

25 THE COURT: Sure.

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1 MR. SAAVEDRA: I was looking over the discovery in the
2 matter preparing for the conference yesterday, and I noticed
3 that we had in our initial disclosures had provided a large
4 number of transcripts from the criminal trial already to the
5 plaintiff, and I was wondering if perhaps Mr. Gilliard did not
6 have them and I could re-send them. But maybe those are the
7 documents he's -- to my understanding, he has a large, at least
8 it looks like close to 50 pages of transcripts from the trial
9 already.

10 THE COURT: Do you know if you sent him the page --
11 hold on a second, Mr. Gilliard. Do you know, counsel, if you
12 sent him the pages from the dates that he specified?

13 MR. SAAVEDRA: I'm confirming that now, your Honor.
14 There is quite a voluminous file. I'm trying to find exactly
15 where the date would be noted on these transcripts.

16 THE COURT: Yes. Mr. Gilliard.

17 MR. GILLIARD: Yes. The days that I need the
18 transcript that he sent me from -- one is from February -- one
19 is from February 27, 2013. That's with Mr. Class son. I'm
20 trying to --

21 THE COURT: How do you spell that?

22 MR. GILLIARD: What?

23 THE COURT: How do you spell that name?

24 MR. GILLIARD: Classes, C-l-a-s-s-e-s.

25 THE COURT: Classes?

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1 MR. GILLIARD: Yes, Classes.

2 THE COURT: OK.

3 MR. GILLIARD: That is from the defendant Classes.
4 That's his testimony. And the other one is from -- I can't
5 pronounce the name. It is T-o-m-p-k-i-n-s.

6 MR. SAAVEDRA: Your Honor, if I may?

7 THE COURT: Sure.

8 MR. SAAVEDRA: It appears that the transcripts are
9 of -- and, again, I don't have the tapes, I can't find them --
10 but they are the direct and crosses of two police witnesses
11 from Mr. Gilliard's trial, one a named defendant in this case
12 and one a nonparty.

13 THE COURT: What are the two names?

14 MR. SAAVEDRA: Tompkins and Classes. Classes is a
15 defendant in this lawsuit. And the transcripts are the direct
16 and the cross-examinations of those individuals.

17 MR. GILLIARD: Excuse me, your Honor.

18 THE COURT: Yes.

19 MR. GILLIARD: Tompkins is the sergeant that was in
20 the vehicle. That's the sergeant's name that I wanted, but
21 they gave me another sergeant's name. I told that to --

22 MR. SAAVEDRA: Right. I did want to raise that with
23 your Honor. During the deposition we uncovered that the
24 sergeant identified wasn't the sergeant that the plaintiff was
25 trying to sue.

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1 THE COURT: OK. So we have two separate issues. One
2 is whether one of the named defendants in this case should be
3 dropped and another person added so that we have the right
4 sergeant as a defendant in this case, and the second issue is
5 whether the transcripts that were provided are all that
6 Mr. Gilliard is looking for or whether there is other testimony
7 by other officers, or anybody else, who plaintiff still feels
8 he needs in connection with this case. So let's deal with the
9 discovery issue first and then I'll circle back around to the
10 pleading.

11 So, Mr. Gilliard -- am I pronouncing your name right,
12 by the way?

13 MR. GILLIARD: Yes. You are pronouncing it right.

14 THE COURT: Gilliard, OK.

15 So, Mr. Gilliard, you had said the last time we spoke
16 that you were looking for testimony by certain people at your
17 trial for the statements that they made at the trial. Who are
18 the witnesses or defendants -- who are the people whose
19 testimony you are looking for?

20 MR. GILLIARD: The testimony I'm looking for is from
21 the complainant, Jose Bravo.

22 THE COURT: Oh, the complainant?

23 MR. GILLIARD: Yes. I believe the date was the
24 14th or the 15th or the 19th, either one of those days he came
25 and testified.

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1 THE COURT: OK. Was that the only testimony you are
2 looking for that you don't already have?

3 MR. GILLIARD: That's the only one I need. I got the
4 other one and the correction of those Sergeant Tompkins --
5 Tompkins was the sergeant that was active on that day.

6 THE COURT: OK. But, first, just for the discovery
7 issue of what testimony you're looking for, when you say in
8 your letter, you mentioned Mr. Jose Bravo, he's --

9 MR. GILLIARD: Right.

10 THE COURT: -- the complaining witness against you in
11 the criminal case and it's his testimony, direct and
12 cross-examination, that you are looking for?

13 MR. GILLIARD: Right.

14 THE COURT: All right. So, Mr. Saavedra, on that, do
15 you know if you have any more transcripts in your possession
16 besides the ones that were provided?

17 MR. SAAVEDRA: No, your Honor. The ones that I
18 provided were the ones that were in the Criminal Court file,
19 and I had given Mr. Gilliard everything I have.

20 THE COURT: When you are talking about the Criminal
21 Court file, what do you mean by that?

22 MR. SAAVEDRA: Whatever I could pick up from the
23 Supreme Court. They keep those files that they disclosed to
24 us. Sometimes transcripts are included.

25 THE COURT: And sometimes they are not?

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1 MR. SAAVEDRA: And sometimes they are not, yes.

2 THE COURT: If they are not included, is there a way
3 that you can get them?

4 MR. SAAVEDRA: Sure. Yes. We can definitely order
5 the trial transcripts. I just -- the difficulty is
6 determining -- and like Mr. Gilliard says, on numerous
7 occasions -- this was a two-week trial -- there is difficulty
8 determining what day the witness testified.

9 THE COURT: Well, there are two choices here. You can
10 ask for the dates that the plaintiff has identified, March 14,
11 15 and 19, based on his belief that this witness testified on
12 one of those days -- one or more of those days, or you can
13 request the entire transcript because in case that's a mistaken
14 recollection, it would save having to do it again.

15 MR. SAAVEDRA: Yes.

16 THE COURT: I'm thinking maybe getting the entire
17 transcript wouldn't be a bad idea.

18 MR. SAAVEDRA: I see, your Honor. OK. We can
19 certainly request that.

20 THE COURT: OK.

21 MR. SAAVEDRA: And provide the plaintiff, if that's
22 what your Honor thinks we should do in this case.

23 THE COURT: Yes. It seems to me that that's
24 reasonable.

25 Mr. Gilliard, if counsel gets the entire transcript,

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1 do you want the entire transcript or do you want him just to
2 send you that portion with that one witness?

3 MR. GILLIARD: I just need that one witness. I got
4 everything else that he sent me so I only need --

5 THE COURT: That's all you need?

6 MR. GILLIARD: Just his testimony, that's all I need.
7 But if he gets the whole thing, I'll accept it and I'll take
8 out what I need.

9 THE COURT: Well, Mr. Saavedra, maybe you can make a
10 request for the minutes of the direct and cross-examination of
11 this one witness and you can say -- which might have been on
12 these days, although that's not entirely certain, and maybe, if
13 it has to be prepared or maybe there is a way that the court
14 reporter, or whomever would have this, can just find that
15 witness and provide that.

16 MR. SAAVEDRA: Perhaps, your Honor. I would certainly
17 be able to look into that.

18 THE COURT: OK. So let's do it with a fallback plan.
19 Try in the first instance just to request the testimony of Jose
20 Bravo.

21 MR. SAAVEDRA: OK.

22 THE COURT: And then, you know, put in the request, if
23 it is not possible, you know, simply to identify that portion
24 of the transcript and produce just that portion, then request
25 the entirety. But there is no need to have extra burden on

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1 anyone who is providing this, or you in reviewing this, to do
2 more than is being requested by plaintiff unless defendant
3 independently wants to obtain this for some reason. OK?

4 MR. SAAVEDRA: Right. I agree, your Honor.

5 THE COURT: OK. Fine. So that's good. That deals
6 with docket 84. I don't think that was showing as a motion on
7 the docket so I don't think I need to do an order. If it was
8 showing as an open application, then I'll write something on it
9 quickly to indicate that you are going to be obtaining it. OK?

10 MR. SAAVEDRA: Understood.

11 THE COURT: All right. Now, let's go back to the
12 pleading. How many defendants are named in the -- first of
13 all, do we have an amended complaint already or is this an
14 original complaint?

15 MR. SAAVEDRA: No, your Honor. Unfortunately, we have
16 seven amended complaints.

17 THE COURT: Seven amended complaints?

18 MR. SAAVEDRA: Yes.

19 THE COURT: My memory failed me with respect to that.

20 And what's been the history of these amendments with
21 respect to identification of defendants? Has this been an
22 issue before?

23 MR. SAAVEDRA: Your Honor, it was --

24 THE COURT: There was John Does, right?

25 MR. SAAVEDRA: There was John Does. The number of

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1 amended complaints doesn't reflect the number of new parties
2 added, if that makes sense. I think it was just a streamlining
3 of facts, and to be quite frank, a couple of more just
4 repetitive and stating the same thing. But the identification
5 issue is that we were trying to locate the desk sergeant on
6 duty at the time of the incident.

7 THE COURT: The desk sergeant on duty?

8 MR. SAAVEDRA: Yes. So we identified that person.
9 Unfortunately, it was not exactly who the plaintiff was trying
10 to sue.

11 I will say that the right name, the name the plaintiff
12 wants to now add, was disclosed in the initial disclosures.
13 How he remembered that person was the right person. So
14 Mr. Gilliard has been in possession of and has had access to
15 the right name of the sergeant since initial disclosures were
16 provided in this matter.

17 THE COURT: All right. The person who is the wrong
18 person, is that Sergeant Lavecchia?

19 MR. SAAVEDRA: Yes.

20 MR. GILLIARD: Yes.

21 THE COURT: All right. So you want to drop Sergeant
22 Lavecchia from the complaint?

23 MR. GILLIARD: That's correct and I want to put
24 Tompkins in.

25 THE COURT: And I'll put Tompkins instead?

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1 MR. GILLIARD: Right.

2 THE COURT: And Tompkins, of course, has never been
3 served?

4 MR. SAAVEDRA: Yes.

5 MR. GILLIARD: Well, he was the sergeant on that day,
6 and he was in the vehicle with Officer Classes.

7 THE COURT: All right. So, Mr. Saavedra, fill me in.
8 The other amendments that have happened, have any of them been
9 the results of motions for leave to amend or have they all just
10 been without objection?

11 MR. SAAVEDRA: No, your Honor. We haven't opposed any
12 of the amended complaints but they haven't been done with leave
13 per se.

14 What I will say, your Honor, is I think it might be a
15 superfluous amendment. The plaintiff -- and this is all in the
16 deposition transcript, of course, testified to -- you know,
17 being arrested by Officer Classes at upon the direction or
18 order of this Sergeant Tompkins. The plaintiff was then taken
19 to the precinct where the paperwork was done by an Officer
20 Parris, who is another named defendant. I don't know what is
21 added by adding the sergeant to the complaint.

22 The city's position is a very straightforward
23 complaining victim case. It should be resolved on summary
24 judgment. I don't think the addition of a sergeant who was
25 simply present in the car is going to change the outcome of

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1 that result. It also is a little late in the game to be adding
2 new parties, if I may.

3 THE COURT: Mr. Gilliard, when did the events that
4 you're complaining about in this case, when did they occur?

5 MR. GILLIARD: What?

6 THE COURT: When is the incident that you claim
7 violated your rights?

8 MR. GILLIARD: The incident, October 2011, 26.

9 THE COURT: Well, at this point you may have a statute
10 of limitations issue with respect to naming someone -- I mean,
11 it's possible that you might be able to get around that if
12 there was notice or maybe if there was mistake and, you know,
13 there might be an argument. But just be aware, when you have a
14 John Doe or if you name the wrong person, you don't necessarily
15 get the benefit of a toll of the statute of limitations, which
16 is presumably three years. So you may have an issue there.

17 Also, you know, the complaint would need to be amended
18 again to name the correct person and it would have to be served
19 on Sergeant Tompkins.

20 Is this sergeant still employed there?

21 MR. GILLIARD: No, he is not there any more. As of
22 the --

23 THE COURT: Well, let me ask defense counsel. Is he
24 still with the Department? Did he retire?

25 MR. SAAVEDRA: No, your Honor. He is a lieutenant now

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1 with a different precinct.

2 THE COURT: I see. So would defendants object to this
3 amendment at this time?

4 MR. SAAVEDRA: I --

5 THE COURT: Because if there is going to be an
6 objection to the amendment or joinder -- I assume you wouldn't
7 object to dropping somebody?

8 MR. SAAVEDRA: No.

9 THE COURT: Right. But if there is going to be an
10 objection to adding another defendant, then I'm going to have
11 to ask Mr. Gilliard to lay out why he believes this amendment
12 should be permitted, you know, and a motion for leave to amend.
13 It could be a simple one, but, still, and there can be an
14 opposition and then I'm going to have to rule on that.

15 Hold on just one second. I'm just going to grab a
16 copy of Rule 15.

17 MR. SAAVEDRA: Sure.

18 (Pause)

19 THE COURT: I mean, if you've got a statute of
20 limitations problem, Mr. Gilliard, the rule provides that the
21 amendment of a pleading can relate back to the date that you
22 filed the original pleading, so you could get the benefit of
23 that date, only in certain circumstances. You've got to have
24 certain requirements satisfied under Rule 15(c), which provides
25 that an amendment will relate back to that original date when

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1 the law that provides the statute of limitations allows you to
2 do that, allows relation back, the amendment asserts a claim or
3 defense that arose out of the conduct, transaction, or
4 occurrence set out or attempted to be set out in the original
5 pleading, or if the amendment changes the party, or the naming
6 of the party, against whom a claim is asserted -- which is what
7 we've got going here -- if there was notice, in other words, if
8 Sergeant Tompkins or now Lieutenant Tompkins got notice of the
9 action so that he wouldn't be prejudiced, and if he knew or
10 should have known that the action would have been brought
11 against him but for a mistake concerning the proper person's
12 identity. So that may be a difficult standard but it's one
13 that you might be able to argue because this would obviously
14 arise out of the same facts. You might be able to argue based
15 on your allegations that this individual, then Sergeant
16 Tompkins, got notice of the action, wouldn't have been
17 prejudiced, knew it would have been him except for a mistake
18 that you made, you know, maybe/maybe not, but that's what you
19 would have to be arguing if your claim would otherwise be
20 futile under the statute of limitations. Because if the events
21 took place in 2011, you know, by October of 2014 --

22 MR. GILLIARD: I didn't get all the police officers'
23 names until 2015.

24 THE COURT: Well, that may or may not be enough. I
25 mean, you did bring this case in June of 2014. So at that

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1 point you would have been within three years. At this point,
2 almost two years later, you are no longer within that
3 three-year statute of limitations period for Section 1983
4 claims. So you would have -- you know, if the amendment would
5 be futile, in other words, if the claim would be subject to
6 dismissal on statute of limitations grounds, or on some other
7 grounds, as soon as you brought it, then the amendment would
8 not be allowed. If there is a possible argument that you can
9 get around the statute of limitations' problem because the
10 Sergeant would have had notice and he would have known he was
11 the right person but for a mistake that you were making and if
12 under the relevant case law you can meet that standard, you
13 know, I can't say right now whether you can meet that or can't
14 meet that, but that's what you would be having to show.

15 All right? Are you following me?

16 MR. GILLIARD: Yes, ma'am.

17 THE COURT: OK. So if defendant does not consent to
18 the amendment, what you'll need to do is get to the Law Library
19 and do some research about the concept of mistake and notice in
20 this -- it is part of Rule 15 that talks about relation back,
21 because you'll have a statute of limitations problem otherwise,
22 it would seem to me. And I'm speaking a little bit off the
23 cuff here. I don't have any motion papers in front of me. I
24 don't have cases in front of me. I'm just trying to give you
25 an idea of, you know, what you would need to show at this

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1 point. And it may be difficult if you had the name previously
2 and, you know, it took this much longer to say which person it
3 should have been. Of course, you may not have had the name in
4 the first place until after the statute ran so I'm not sure how
5 that all plays out.

6 Mr. Saavedra, though, I think you should --

7 MR. SAAVEDRA: Your Honor, if I could --

8 THE COURT: -- think about it and take it back and
9 decide what you want to do.

10 MR. SAAVEDRA: Understood. And I do agree with your
11 Honor, it is a substantive situation. The thing that makes me
12 hesitate is I really -- the thing that makes me not want to
13 oppose an amendment is that I think this case is ripe for
14 summary judgment and prolonging it with motion practice on an
15 amendment would just really delay the outcome of the matter.

16 THE COURT: Well, here's my only concern about this.
17 You know, if you're wrong with respect to summary judgment
18 about the sergeant --

19 MR. SAAVEDRA: Mm-hmm.

20 THE COURT: -- then -- or anything else, but let's
21 just focus on the sergeant, then there's that much more delay
22 by plaintiff in trying to get the right person named. I don't
23 want him to be prejudiced by that, to the extent that matters.
24 It might make sense, if you are going to object, to let
25 plaintiff at least make his motion to amend and have that

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1 pending so that, you know, that will be there -- you know,
2 maybe even have it decided quickly. If there is a motion for
3 summary judgment and you move against a pleading that gets
4 amended, then your motion doesn't make a lot of sense.

5 I'm thinking out loud. Is that the logical order of
6 things?

7 MR. SAAVEDRA: I appreciate it.

8 THE COURT: Maybe the thing to do -- I mean, I want to
9 give you an opportunity to consult with your clients and to
10 decide whether you want to oppose it or not, but maybe the
11 thing to do is just allow the amendment and it will be there on
12 the docket and maybe even before it's served, while service is,
13 you know, underway, if you think discovery is otherwise done
14 and you've got a motion, you know, make it as it gets the
15 correctly named defendant and then, you know, you can throw
16 right in there any other issues that you have about that
17 defendant.

18 MR. SAAVEDRA: Yes. That might be the best solution.
19 I agree with your Honor. I would appreciate the chance to
20 confer with supervisors and my clients, however.

21 THE COURT: OK. What discovery remains at this point?

22 MR. SAAVEDRA: None, your Honor, from our perspective.

23 THE COURT: And on plaintiff's side, the only thing
24 you are still looking for is this testimony by Mr. Bravo?

25 MR. GILLIARD: Yes.

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1 THE COURT: There is no other discovery you feel you
2 need?

3 MR. GILLIARD: No, no other.

4 THE COURT: All right. My only concern, then, is if I
5 set a schedule for summary judgment and you haven't gotten that
6 transcript yet, Mr. Gilliard feels he needs it to oppose
7 summary judgment in some way, then the motion will have been
8 premature.

9 MR. SAAVEDRA: Right. I will say, your Honor,
10 typically it takes 30 days to get the transcripts from the
11 state courts.

12 THE COURT: I think I only had this case referred to
13 me for general pretrial supervision. I don't think I have this
14 for dispositive motions -- for a report and recommendation on a
15 dispositive motion. I think it's just to supervise the case in
16 discovery, which, I'll add, by the way, includes if I can help
17 with settlement. Given that you are pretty much poised and
18 ready to move for summary judgment, do I take that to mean that
19 you are not interested in settlement or might there be an
20 interest?

21 MR. SAAVEDRA: Your Honor, I made Mr. Gilliard an
22 offer. However, Mr. Gilliard has a number of cases that him
23 and I are litigating and we are trying to settle them all --

24 THE COURT: Oh, how many of them --

25 MR. SAAVEDRA: -- so that there is a hindrance.

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1 THE COURT: How many of them are being litigated in
2 this court?

3 MR. SAAVEDRA: I believe there is one other one in
4 front of Judge Torres.

5 THE COURT: What's being litigated in any other court?

6 MR. SAAVEDRA: No. That's it, your Honor, these two
7 cases.

8 THE COURT: You are trying to settle two cases
9 simultaneously?

10 MR. SAAVEDRA: Right.

11 THE COURT: Mr. Gilliard --

12 MR. SAAVEDRA: I'll rephrase, your Honor. I only have
13 authority to settle both cases at the same time. I don't have
14 authority to only settle one.

15 THE COURT: Well, is there a magistrate judge assigned
16 on the case before Judge Torres?

17 MR. SAAVEDRA: Judge Gorenstein is the magistrate,
18 your Honor.

19 THE COURT: Has he talked to the parties about
20 settlement in that case?

21 MR. SAAVEDRA: No. That case is further -- or less
22 far along.

23 THE COURT: Is it referred to him?

24 MR. SAAVEDRA: I believe so, your Honor.

25 THE COURT: Well, I'm sure neither Judge Torres nor

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Judge Gorenstein would mind if settlement discussions were had that dealt with both cases and managed to resolve both cases.

MR. SAAVEDRA: I agree, your Honor. I just meant that we would be happy to do that, but I've cited Mr. Gilliard my full authority and he has rejected it, so I'm not sure that it would be beneficial at this point.

THE COURT: All right. Just so you know, we have a court reporter here, as we do for all of these conferences. So I want to talk to you a little bit about the settlement numbers. If anybody obtains a copy of this transcript and files it for any reason, that part should be redacted and separately placed under seal.

MR. SAAVEDRA: Understood, your Honor.

THE COURT: Because settlement discussions don't have to be part of the public record, but we're going to keep the court reporter going. Because the case is a *pro se* case, I always would have a record, even if it is a sealed one.

MR. SAAVEDRA: Understood, your Honor. And I had provided Mr. Gilliard and I hope he has received all of the transcripts of our previous conferences.

MR. GILLIARD: I just got them two days ago.

THE COURT: OK. I would love it if you would do the same for this one. That would be nice.

MR. SAAVEDRA: Of course.

THE COURT: So what kind of demand and offer are we

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1 talking about here for these two cases?

2 MR. SAAVEDRA: Well, your Honor, if I may? The
3 plaintiff has been treating two cases separately in terms of
4 settlement. I believe the last offer he made regarding this
5 matter -- and, Mr. Gilliard, please feel to correct me as I'm
6 working off memory -- was in the neighborhood of 4,000. I
7 offered, and as I mentioned to the Court, my full extent was a
8 thousand dollars to settle both matters -- which are in all
9 actuality very similar allegations -- a thousand dollars to
10 settle both matters. Mr. Gilliard rejected the offer, and
11 since then we haven't had much settlement negotiations.

12 THE COURT: I'm sorry. The 4,000 was the amount being
13 sought on one case?

14 MR. SAAVEDRA: Yes.

15 MR. GILLIARD: That's for the --

16 THE COURT: I'm sorry?

17 MR. GILLIARD: That's for the May case.

18 THE COURT: The May case is the case before Judge
19 Torres?

20 MR. GILLIARD: Yes. That's the one I tried to settle
21 for 4,000.

22 THE COURT: And did you have a settlement demand in
23 the other case, the one before me?

24 MR. GILLIARD: No. This one right here? No. He said
25 something at the video conference that he wanted to settle both

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1 cases for a thousand dollars, and I refused it because for this
2 case I was locked up for 17 months, not getting my treatments
3 and nothing for my hives and all of that and I lost a lot of
4 things so I denied it.

5 THE COURT: What were the circumstances of the other
6 case?

7 MR. GILLIARD: The other case was similar, the same.
8 I was stopped in front of my building, in front of 225, and I
9 got arrested. I got locked up at 3 o'clock, which the report
10 said they locked me up at 7 o'clock, so for four hours I was in
11 the precinct. And then he took me to another precinct for a
12 lineup and then I went to Central Booking and everything, and I
13 went to the Grand Jury and all the charges was thrown out.

14 THE COURT: So both cases you say were arrested
15 without probable cause?

16 MR. GILLIARD: Without probable cause.

17 THE COURT: And in both cases there was a complaining
18 witness?

19 MR. SAAVEDRA: Yes, your Honor. In both cases the
20 complaining victim, both cases accusing Mr. Gilliard of
21 forcibly stealing their cell phones.

22 THE COURT: The same witness or a different witness?

23 MR. SAAVEDRA: Different witnesses.

24 THE COURT: So two different people on two different
25 occasions complained that Mr. Gilliard had stolen cell phones?

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1 MR. SAAVEDRA: Yes.

2 THE COURT: In the same location?

3 MR. SAAVEDRA: One was -- generally in the Bronx. I
4 would say in the 40th Precinct is the location.

5 THE COURT: And both witnesses identified
6 Mr. Gilliard?

7 MR. SAAVEDRA: Yes, your Honor. One was a lineup and
8 one was a stop -- a point. I forgot the law enforcement term
9 but just he pointed --

10 THE COURT: A showup?

11 MR. SAAVEDRA: -- out Mr. Gilliard. Yes, a showup.
12 Yes.

13 THE COURT: And both charges were eventually dismissed
14 without it proceeding to trial?

15 MR. SAAVEDRA: No. The current case that we're
16 handling resulted in a two-week trial and the plaintiff was
17 acquitted at trial.

18 MR. GILLIARD: This one, the one that we are having
19 right now, took 17 months to go to trial.

20 THE COURT: And there was a grand jury indictment on
21 the one --

22 MR. SAAVEDRA: In both cases, your Honor.

23 THE COURT: Both cases had grand jury indictments?

24 MR. GILLIARD: The first -- the second one is no grand
25 jury indictment. The grand jury threw it out, I'm almost

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Speakerphone Conference

1 positive.

2 MR. SAAVEDRA: I'm sorry, your Honor. He may be
3 right. That case is earlier along.

4 THE COURT: The one in May, the Grand Jury through it
5 out?

6 MR. GILLIARD: The Grand Jury threw it out.

7 MR. SAAVEDRA: No, your Honor. I'm sorry.

8 Mr. Gilliard is incorrect. I'm staring at the True Bill signed
9 by the Foreman.

10 MR. GILLIARD: The Grand Jury threw it out, the one in
11 May.

12 MR. SAAVEDRA: I'm sorry, Mr. Gilliard. This is not
13 true.

14 THE COURT: Well, if there was a --

15 MR. SAAVEDRA: Oh, I'm sorry. I'm sorry. I'm
16 mistaken. I'm reading the wrong document. Mr. Gilliard is
17 correct. The Grand Jury did not find a true bill in that other
18 case.

19 THE COURT: OK. So one was indicted and one was not?

20 MR. SAAVEDRA: Right.

21 THE COURT: The one in front of me was the one that
22 was indicted?

23 MR. SAAVEDRA: Yes, your Honor.

24 THE COURT: So, Mr. Gilliard, usually the law is that
25 if the Grand Jury has found probable cause -- that's what the

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1 Grand Jury is charged with figuring out, is there probable
2 cause such that the person should stand trial -- then usually
3 an argument that there was no probable cause for the arrest
4 doesn't go that far because you've got a Grand Jury looking at
5 it and deciding that there was probable cause. What is it
6 about this case that makes you think that you still a good
7 constitutional claim?

8 MR. GILLIARD: Because I was found not guilty. I went
9 to trial (inaudible) --

10 THE COURT: Start again. The court reporter couldn't
11 hear you.

12 MR. GILLIARD: OK. I stayed in jail for 17 months. I
13 went to trial. The witness couldn't identify me at trial. He
14 didn't make -- and he got robbed on the 23rd. He got robbed on
15 the 23rd and they locked me up on the 26th, three days later,
16 and they didn't do a proper investigation on that. It was just
17 like a black male with braids in his hair. And they came
18 around the corner and they picked the first black male up and
19 they locked me up.

20 THE COURT: So, Mr. Saavedra, if you do a summary
21 judgment motion on this case, the basis of the motion is what?

22 MR. SAAVEDRA: The basis is that there was a
23 complaining victim. I have the paperwork. We also have the
24 Grand Jury Indictment and we'll soon have the trial transcript,
25 I suppose, of him testifying at court. Not that it matters, I

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Speakerphone Conference

1 suppose, but --

2 THE COURT: No, I don't think the trial transcript is
3 going to matter because --

4 MR. SAAVEDRA: Yes.

5 THE COURT: -- the question is whether there was
6 probable cause at the time, not what somebody remembers later.

7 MR. SAAVEDRA: Right. Honestly, that's the way we see
8 the case, your Honor. I tried to explain as much to
9 Mr. Gilliard but, unfortunately, we couldn't come to an
10 agreement.

11 THE COURT: Mr. Gilliard, the thing is that when the
12 evidence gets presented to a Grand Jury and the Grand Jury
13 decides to indict, it means the Grand Jury has determined that
14 there was probable cause to have you held in custody and go to
15 trial. So it becomes more difficult to say that there was no
16 probable cause and that it was a constitutionally deficient
17 arrest. So I don't know how successful this will be.

18 Again, I don't have any papers in front of me. I'm
19 not reading anybody's legal argument, but for settlement
20 purposes, you may have some real obstacles here on this case in
21 front of me. You may have one fewer obstacle with respect to
22 the other case if the Grand Jury refused to indict. But,
23 again, if you've got a complaining witness who identifies you,
24 the police may not need much more than that unless there is
25 reason for them to believe that it's not a valid identification

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Speakerphone Conference

1 or not a valid complaint.

2 So I just want to caution you that even if you were
3 arrested unjustly both times, meaning that you were innocent of
4 these crimes and the police, you know, were hasty, legally you
5 may have some difficulty with both of the cases. It may not be
6 that easy for you to get where you want to go with them.
7 So for settlement purposes think about that.

8 I don't know if the city could possibly come up with
9 more authority. I understand the thousand dollars on both
10 cases is the limit of the city's authority at this time, but,
11 you know, if you countered and said I would settle both cases
12 for and you came up with many some amount of money they knew
13 would do it to settle both cases, you know, they might possibly
14 come up with some more. I don't know, but I could try to help
15 with that process a little bit.

16 Can you at least give some thought to what you would
17 take to resolve both cases and see if you might want to make a
18 demand for the two of them rolled up together?

19 MR. GILLIARD: Yes, ma'am.

20 THE COURT: OK. Be aware of it, even if you had a
21 terrible experience and were held, you know, without it being
22 your fault for a lengthy period of time, it doesn't necessarily
23 translate legally to a constitutional violation. OK? You've
24 still got to look at that law and figure out if you are going
25 to be able to get past the obstacles that you have. All right?

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Speakerphone Conference

1 MR. GILLIARD: Yes, ma'am.

2 THE COURT: OK. So I have another call that's waiting
3 for me. I'm running a little bit late. I've got somebody else
4 at another facility, a second *pro se* prisoner call of the day.
5 So I've got to bring this one to an end.

6 So if you could promptly request that testimony?

7 MR. SAAVEDRA: Yes, your Honor.

8 THE COURT: OK. And then if you could also write to
9 the Court, with a copy to Mr. Gilliard, within a couple of
10 days, make a decision on whether you will oppose a motion to
11 amend or not.

12 MR. SAAVEDRA: OK.

13 THE COURT: All right. If you are not going to oppose
14 it, then, Mr. Gilliard, I am going to give you a pretty short
15 deadline to get in yet another pleading that's the same as what
16 you've got now that would just switch out the name of the
17 defendant.

18 MR. GILLIARD: Right.

19 THE COURT: The Sergeant. I wouldn't expect there to
20 be other changes. OK?

21 And then I would also ask the city the same time you
22 are telling me whether you don't oppose it, if you are not
23 opposing it, to get me the information as to how this person
24 may be served.

25 MR. SAAVEDRA: Understood, your Honor.

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Speakerphone Conference

1 THE COURT: So that we can get the information to the
2 Marshal Service and they can serve this defendant. I've got to
3 get all of that moving.

4 MR. SAAVEDRA: Right.

5 THE COURT: Right. I'll set a schedule for all of
6 these things based on what I see coming in and your letter.

7 MR. SAAVEDRA: OK.

8 THE COURT: All right. And then I'll talk to Judge
9 Oetken as to whether he would want me to set a summary judgment
10 briefing scheduling or whether he would like you to reach out
11 to him --

12 MR. SAAVEDRA: Understood, your Honor.

13 THE COURT: -- for that. OK. But I'm not going to
14 schedule another conference right now. Let's see. I'm going
15 to look for a letter within two business days about whether or
16 not there will be an opposition to a motion to amend. And, you
17 know, please confirm in that letter that you've requested this
18 transcript, too, so I know that's in the works.

19 MR. SAAVEDRA: OK.

20 THE COURT: All right. And then I'll take it from
21 there.

22 MR. GILLIARD: Should I make an amendment?

23 THE COURT: No. Don't do it yet. Sit tight. Because
24 I am going to wait and see if there is going to be an
25 objection. If there is not going to be an objection, I will

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Speakerphone Conference

1 issue an order saying just get your amended complaint in by a
2 certain day. If there is going to be an objection, then I will
3 set a scheduled for a motion to amend. OK?

4 MR. GILLIARD: OK.

5 THE COURT: And I'll lay out what needs to happen on
6 that.

7 MR. GILLIARD: OK.

8 THE COURT: All right. So sit tight and watch for an
9 order from me. All right?

10 MR. GILLIARD: OK.

11 THE COURT: OK. I think we'll be in business if you
12 wait for me to issue an order after I get a letter from the
13 city. OK?

14 MR. GILLIARD: OK.

15 THE COURT: All right. Thank you both.

16 MR. SAAVEDRA: Thank you, Judge.

17 THE COURT: All right. Bye-bye.

18 (Call disconnected)

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